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IN THE

Supreme Court of the United States

October Term, 1955

No.

SIMON J. NASH, etc., *Petitioner,*

v.

INTERSTATE COMMERCE COMMISSION *et al., Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit herein, which affirmed the judgment of the United States District Court for the District of Columbia, dismissing petitioner's amended complaint against the respondents.

OPINIONS BELOW

The opinion of the Court of Appeals is printed in the appendix hereto. It is reported in 225 F. 2d 42.

JURISDICTION

The judgment of the Court of Appeals was entered on July 14, 1955 (R. 57) A petition for rehearing en banc was filed on July 29, 1955, (R. 58) and was denied by *per curiam* order entered September 1, 1955. (R. 72). The jurisdiction of this Court is invoked under Section 1254 (1) of Title 28, United States Code. On November 30, 1955, an order was signed by the Chief Justice, granting petitioner's motion to extend the time within which to file this petition to December 10, 1955.

QUESTIONS PRESENTED

1. Was it lawful for the Interstate Commerce Commission, under 5 CFR 34.5(b)(3), to designate as hearing examiners the incumbents of 28 positions which the Commission had reallocated as hearing examiner positions on the basis of the decision of this Court in *Riss & Co., Inc.*, v. *U. S. et al.*, 341 U.S. 907, where the 28 incumbents so designated were members of one or another of the following classes:

(a) Employees who had never been detailed to preside at hearings or to formulate initial decisions on matters which were subject to agency adjudication (that is, employees who had never performed any hearing examiner duties, whatever).

(b) Employees who had performed hearing examiner duties in prior years, but who were not performing such duties at the time of the *Riss* decision and had performed no such duties within the year preceding that decision.

(c) Employees whose principal duties, both before and after designation as hearing examiners under the regulation cited, required them to par-

ticipate actively in the formulation of Commission policy, either as a confidential assistant to a member of the Commission or as a staff officer regularly consulted by the Commission on matters of law and policy pertaining to the exercise of the Commission's functions, including contested proceedings involving determination of property rights awaiting adjudication by the Commission.

(d) Employees of the Commission assigned to its Bureaus of Finance and Formal Cases, who performed no duties in connection with motor-carrier licensing proceedings under Sections 206 and 207 of the Interstate Commerce Act, which were the kind of proceedings involved in the *Riss* case.

2. Did the petitioner, and persons similarly situated, as incumbents of positions which were admittedly reallocable under the *Riss* decision and as persons entitled to the benefits of the Veterans Preference Act of 1944, have a legal right, arising under the Due Process Clause of the Fifth Amendment or conferred by the provisions of Sections 2 and 14 of the Veterans Preference Act, to require the Interstate Commerce Commission to reallocate their positions and to designate them as hearing examiners under 5 CFR 34.5(b)(3), where it is admitted as to each of the said incumbents (a) that he had completed a probationary period in the position, prior to the *Riss* decision, and had been given ratings of "Satisfactory" or better by the Commission covering his actual performance of the duties of the position during the 15-month period immediately preceding the decision; (b) that he satisfied all the requirements for appointment set forth in Section 11 of the A.P.A. and in the regulation cited; and (c) that he had been found qualified for appoint-

ment to hearing examiner positions in the open competitive examination conducted by the Civil Service Commission and was awaiting appointment from the official register of eligibles established and maintained by that Commission on the basis of its findings in the examination.

3. Should this Court's holding in *Adkins* v. *DuPont Co.*, 335 U.S. 331, be construed as *requiring* the District Court to deny a plaintiff's motion for leave to appeal from an order dismissing his complaint *in forma pauperis*, solely because the affidavit of poverty shows that the plaintiff is employed at a salary of $5,200.00 per annum, when the affidavit also shows (a) that the plaintiff owns no property except personal effects of a value of less than $50, and (b) that his personal debts are in excess of $1,500.00?

4. Where, prior to the decision of this Court in *Blackmar* v. *Guerre*, 342 U.S. 512, a complaint, naming as defendants the Interstate Commerce Commission and the Civil Service Commisison as two corporate entities, was dismissed by the District Court for want of jurisdiction and failure to state a claim, and where a notice of appeal to the Court of Appeals was filed in the District Court prior to the decision in the case cited: (a) Did the District Court retain jurisdiction to grant plaintiff's motions to amend the summons and complaint and to add parties defendant, by substituting the members of the Civil Service Commission as defendants in place of the Commission as an entity, and by changing the wording of the summons and complaint to correspond with the substitution; and (b) would the exercise of sound judicial discretion ordinarily require that such motions be granted, where no claim is made that any party would be prejudiced

thereby, where the substantive rights of the parties would not be affected, where the granting of the motions would be subject to review in the appeal already pending in the Court of Appeals, and where the granting of the motions was a condition precedent to the adjudication of the case on the merits.

5. Where, under the circumstances outlined in Question 4, the District Court denies the motions to amend and to add parties defendant, did the Court of Appeals have jurisdiction to grant the appellant's motions in that Court to add parties appellee by substituting the members for the Commission and to amend the summons and complaint in order to reflect the substitution, where there was no claim that any party would be prejudiced thereby, where the substantive rights of the parties would not be affected, and where the substitution of parties and the explanatory amendment of the summons and complaint were conditions precedent to the adjudication of the appeal on the merits; and (b) would the sound exercise of judicial discretion ordinarily require that such relief be granted by the Court of Appeals, under the described circumstances.

STATUTES AND REGULATIONS INVOLVED

(Note: The statutes and regulations involved herein are set forth in the Supplement hereto, at page 24, *infra*.)

STATEMENT OF CASE

The case involves a regulation of the Civil Service Commission, promulgated April 25, 1951, under the authority conferred on the Commission by Section 11 of the Administrative Procedure Act, 60 Stat. 237, (as

amended), 5 U.S.C. 1001 *et seq.*, hereinafter referred to, respectively, as "Section 11" and "A.P.A." The regulation was originally published as Section 34.5 (b)(3) of Title 5, Code of Federal Regulations (16 F.R. 3527). It was republished as Section 34.3(c) of the same title, without change, other than the renumbering, on September 21, 1951, (16 F.R. 9625), and as such it is currently in effect. The text of the regulation is set forth on page 25, *infra.*

Section 11 of the A.P.A. became effective on June 11, 1947, a year after the rest of the Act went into effect. It provides generally for the appointment of examiners by federal agencies whose functions include the adjudication of cases on the basis of records made at hearings required by statute. (See p. 24, *infra,* for text of Section 11.) It requires each agency to appoint "as many qualified and competent examiners as may be necessary for proceedings pursuant to Sections 7 and 8" of the A.P.A., which cover the subjects of "Hearings" and "Decisions," respectively.

The principal duties of examiners, as described in Sections 7(a)(3) and 8(a) of the A.P.A., are (1) to preside at hearings held by agencies, in adjudication proceedings in which hearings are required by statute; and (2) to formulate the initial agency decision in cases which have been referred to them for hearing. The initial decision of the examiner becomes the final decision of the agency, in the absence of an appeal to the agency therefrom or a review thereof by the agency on its own motion, within time limits set by the procedural rules of the particular agency. Specific powers, incident to the performance of their quasi-judicial duties, are conferred on examiners by Section 7(b) of the A.P.A. The employing agencies exercise gen-

eral administrative supervision over the examiners in their employ, but they have no control over such matters as examiners' pay, advancement by promotion, or tenure, which Section 11 places within the exclusive jurisdiction of the Civil Service Commission.

In accordance with the duty imposed on it by Section 11, the Civil Service Commission, early in 1947, appointed a group of six consultants, designated as a Board of Examiners to assist it in establishing standards for the recruitment of examiners and in reviewing the qualifications of incumbents, who were serving in positions involving the performance of examiner duties on the effective date of Section 11. The Commission added the qualifying word, "hearing," to the statutory "examiner", when it published the first general regulations governing appointments under Section 11, on September 23, 1947, as Part 34 of Title 5, Code of Federal Regulations. (12 F.R. 6321.)

On October 21, 1947, the Commission published Examining Circular No. 17, announcing an open competitive examination for the purpose of establishing registers of qualified persons for appointment to hearing examiner positions in the federal service in grades P-4 through P-8, inclusive, (now, GS-11 through GS-15), and that applications would be accepted until further notice. The examination was unassembled, which means that no uniform written or oral test was given to the applicants, who were rated on the basis of their experience as described in their applications. The examining circular provided that all applicants would have to meet certain minimum experience requirements to be eligible to participate in the examination. The circular states:

Applicants must have had as a minimum the length of experience specified in the table below:

Experience Requirement Table

Grade of Position	Total	Amount of Experience General	Special
P-8	6		6
P-7	6		6
P-6	6	1	5
P-5	6	2	4
P-4	6	3	3

It is clear from the above table that no person could be appointed to a hearing examiner position, until he had had at least 6 years of professional experience involving litigation before courts or agencies.

The examining process itself consisted primarily of the comparative evaluation of the qualifications of all applicants for appointment to positions in each particular grade. In addition to the ordinary application filled out by all applicants for federal employment, each participant in the examination was required to submit detailed documentary evidence showing the extent of his experience and qualifications. The circular also provided for oral interviews of candidates by the Board or a panel thereof for the purpose of ascertaining whether they possessed the personal qualifications deemed essential to the proper performance of the quasi-judicial duties of hearing examiners.

On June 11, 1947, when Section 11 took effect, there were, of course, a number of employees in each of the important federal regulatory agencies, whose positions required them to perform hearing examiner duties, that is to preside at hearings and to formulate initial decisions. Those employees were the original

incumbents, and all of them were required by the Civil Service Commission to submit to a re-evaluation of their qualifications in order to retain their positions. The Commission used a special method for examining those of the incumbents who had civil-service status. Although such incumbents were required to submit to re-examination, they were not rated competitively. If such an incumbent showed to the satisfaction of the Board of Examiners that he possessed the necessary qualifications to perform hearing examiner duties commensurate with his grade, he was permitted to keep his job, regardless of the fact that many of the persons who took the examination announced in Circular EC-17 might be found to be better qualified for the position. This concession did not extend, however, to those of the original incumbents who did not have status. Such incumbents were required to compete in the examination, on an equal basis with all other applicants and were allowed to retain their positions only after they had satisfied the Board that they were *better* qualified than any of the other applicants for positions in the same grade.

When the results of the examination were announced, in March, 1948 the Commission was subjected to severe criticism because of the manner in which the examination had been conducted and because of the large number of incumbents who had been found unqualified to retain their positions.[1] So many ap-

[1] In two of the most important agencies, the National Labor Relations Board and the Interstate Commerce Commission, 50 percent of all incumbents were found unqualified and the agencies were ordered to remove them from their positions. Later, all the original incumbents were found qualified and allowed to retain their positions.

peals were filed with the Commission and so much adverse publicity given to the matter, that the Commission decided to conduct a complete re-examination, in which the qualifications of each applicant and incumbent would be re-evaluated, on the basis of information already in the Commission's records, together with additional information and evidence which the Commission proposed to obtain in the course of investigations of the professional backgrounds of applicants. The Board of Examiners which had conducted the first examination resigned, and the Commission itself, assisted by its regular staff, proceeded to conduct the second examination.

In May, 1950, the results of the re-examination were announced and, on the basis thereof, registers of eligibles were established by the Commission. The registers contain the names of persons found qualified for appointment to hearing examiner positions in each of the five grades in which appointments are authorized. Each grade has a corresponding register on which the names of eligibles appear in the order in which they were rated in the examination.

The petitioner in this proceeding was admitted to the bar in New York State in 1939. He is a member of the bar of this Court and of both lower courts, as well as of several other federal courts and agencies. He served in the armed forces between February 1942 and May 1946, and is entitled to the benefits of the Veterans' Preference Act of 1944. After his discharge from the service, he was employed as a Trial Attorney, GS-11 and GS-12, by the Department of the Army, and served more than a year in each grade, with efficiency ratings of "Excellent", which were the highest that might then be awarded. He voluntarily resigned

his position with the Department, in June 1949, and engaged in private practice until employed by the Interstate Commerce Commission in January 1950.

In the early part of 1948, petitioner had applied for examination of his qualifications for appointment under the provisions of the circular announcing the examination. He was found qualified for appointment to positions in grades GS-11 and GS-12. Later, upon showing that he had served more than a year in grade GS-12 with the Department of the Army, he was found qualified for appointment in grade GS-13, also. His name was placed on the three registers from which appointments in the three grades were theoretically to be made, and he has been eligible for appointment in any of those grades at all times since the results of the second examination were announced in May 1950.

On January 9, 1950, petitioner received an excepted appointment to a permanent position as an "examiner" in the Bureau of Motor Carriers of the Interstate Commerce Commission, in grade GS-7. He was promoted to the position of "examiner" in grade GS-9, in October 1950. Until April 16, 1951, petitioner's principal duties were (1) to preside at formal hearings held by the Commission on applications for authority to conduct commercial transportation operations, by motor vehicle, in interstate commerce; and (2) to formulate the initial decision in proceedings referred to him for hearing. In the performance of those duties, petitioner exercised all the functions of hearing examiners set forth in Section 7(b) of the A.P.A. In each case he filed a report containing findings of fact and conclusions thereon, together with a recommended order disposing of the application, which became the final order of the Commission if no ex-

ceptions were filed by a party within 20 days after service of the report and recommended order and if the Commission did not stay the recommended order on its own motion within the same period.

The cases which were referred to appellant for hearing between January 9, 1950, and April 16, 1951, involved applications for certificates and permits, authorizing common-carrier and contract-carrier operations, respectively, and filed under Sections 206(a) and 209(a) of the Interstate Commerce Act. The authority to adjudicate such applications is vested in the Interstate Commerce Commission under Sections 207 and 209 (b), of the Act, neither of which requires, in specific language, that the Commission hold hearings before taking action on such applications, and it was the Commission's view that any hearings which were held in such proceedings were entirely discretionary and that carriers had no *right* to any hearing on their applications. Section 5 of the A.P.A., sets forth the administrative requirements which agencies are bound to observe in formal adjudications of matters within their jurisdiction. The first sentence of Section 5 reads, in part, as follows: "In every case of adjudication *required by statute* to be determined on the record after opportunity for an agency hearing ..." (italics added). Since hearings are not *specifically* required by Sections 207 (a) and 209 (a) of the Interstate Commerce Act, the Commission concluded that proceedings held in connection with applications filed under Sections 206 (a) and 209 (a) were not governed by Section 5 of the APA, and that, consequently, any hearings in connection with such applications were not required to be conducted by examiners appointed under Section 11 of the APA. Prior to April 16, 1951,

such proceedings had been referred to examiners who were employed by the Interstate Commerce Commission under its general powers and whose status was not essentially different from that of other employees and officers of the Commission.

On April 16, 1951, there were about 100 attorneys employed by the Bureau of Motor Carriers of the Interstate Commerce Commission. Of these, only four were hearing examiners appointed under Section 11 of the APA. Most of the others were regularly assigned to duties which required the exercise of hearing examiner functions as enumerated in Section 7 of the APA. The petitioner was one of this group.

On April 16, 1951, this Court ruled that proceedings under Section 207 of the Interstate Commerce Act were subject to the provisions of the APA and that hearings held in such proceedings were required to be held before hearing examiners appointed under Section 11 of the latter Act, notwithstanding the fact that Section 207 does not specifically require that a hearing be held on applications for authority to operate as a motor carrier in interstate commerce. *Riss & Co.*, v. *U.S. et al.*, 341 U.S. 907.

On the date of the *Riss* decision, there were no civil service regulations in effect, dealing specifically with the appointment of hearing examiners. The regulations of Part 34, Title 5, Code of Federal Regulations, had been suspended by the Civil Service Commission, after the Attorney General had rendered an opinion, on February 23, 1951, in which he questioned the legality of the Commission's rules relative to the promotion of hearing examiners. When the *Riss* case was decided the regulations were in the process of

revision and they were not republished until September 21, 1951.

Negotiations were had, after the *Riss* decision was handed down, between representatives of the Interstate Commerce Commission and the Civil Service Commission, for the purpose of working out a method of appointing the incumbent examiners in the Bureau of Motor Carriers to fill the newly created hearing examiner positions, following the reallocation of the "examiner" positions as "hearing examiner" positions on the basis of the decision in the *Riss* case. Thereafter the Civil Service Commission issued a special regulation, in 5 C.F.R. 34.5(b)(3), under which the Interstate Commerce Commission was enabled to make noncompetitive appointments to the new positions of the incumbents of the former examiner positions, following the conversion of such positions (reallocation) to hearing examiner positions. (See Supplement, p. 25)

Thereafter, on April 30, 1951, May 4, 1951, and May 7, 1951, the Interstate Commerce Commission issued three notices to the public, purporting to be authorized under the provisions of Section 11 of the APA, announcing the appointment of a total of 76 employees as hearing examiners, following the administrative reallocation of their positions from "examiner" positions to "hearing examiner" positions. (See Appendix, pp. 4, 5, and 6, for text of the notices.)

On April 24, 1951, petitioner submitted a request for appointment as a hearing examiner on the basis of his incumbency of a position which became a hearing examiner position as a result of the *Riss* decision. A second request was submitted on June 29, 1951 (Appendix 9) and was denied in a Memorandum of

the Chairman of Division 1 of the Commission dated July 5, 1951 (Appendix 11).

In acting under the authority conferred by 5 CFR 34.5(b)(3), the Interstate Commerce Commission limited appointments to those incumbents who were then serving in grades GS-11 through GS-15, the authorized grades in which hearing examiner positions may be classified. It should be noted that before the particular regulation authorizing the designation of incumbents came into operation, it was necessary to reallocate (or reclassify) positions as hearing examiner positions. It was only after the administrative reallocation had been made, under the general provisions of the Classification Act of 1949, changing a position from a non-hearing examiner position to a hearing examiner position, that it was possible to exercise the authority contained in 5 CFR 34.5(b)(3).

It must also be emphasized that the determination to appoint none of the incumbents serving in grade GS-9, regardless of their qualifications and previous experience, was made by the Interstate Commerce Commission. There was *never* any requirement, in any statute or regulation, that even remotely required the Commission to limit appointments to those serving in authorized grades. There was *never* any ruling, informal or otherwise. by the Civil Service Commission, that purported to limit the authority conferred by 5 C.F.R. 34.5(b)(3). It is now conceded, and it was mentioned in the oral argument in the lower court, that the Interstate Commerce Commission *could* have appointed petitioner in grade GS-11, 12, or 13, under the incumbency regulation, *if* it had wished to do so. The only reason given for denial of petitioner's request in the memorandum of Commissioner Mahaffie is the

Commission's lack of *power* to grant it. It is clear beyond any question, that the Commission had full power to designate petitioner at any time within the 6-month period following the *Riss* decision under 5 CFR 34.5(b)(3).

It should also be understood that petitioner's position was unique, and that no embarrassing precedent would have been set if his request had been granted. Of the 30 attorneys serving as examiners in grade GS-9, only 4 had been out of law school for as many as 6 years. The other 26 could not possibly be appointed, because they could not meet the minimum experience requirement of 6 years which was prescribed for all applicants. Of the 4 examiners in grade GS-9 who had the necessary 6 years of legal experience, only petitioner had participated in the open competitive examination, which would certainly seem to be a legitimate basis upon which to justify his designation under the regulation, even though none of the other incumbents with the required experience were designated.

On petitioner's appeal to the Civil Service Commission, the adverse action of the Interstate Commerce Commission was upheld, and on October 10, 1951, this litigation was begun by the filing of the original complaint in the District Court and the service of process on the two defendants named in the complaint, the Interstate Commerce Commission and the U. S. Civil Service Commission. The defendants appeared generally and filed a motion to dismiss the complaint on the grounds that the District Court lacked jurisdiction of the subject matter and that the complaint failed to state a claim on which relief could be granted. The District Court (*Morris, J.*) heard argument on the motion on January 10, 1952, following which the court

ruled that the complaint would be dismissed on both grounds advanced by defendants. No opinion was filed by the court in connection with its ruling. The order dismissing the complaint was filed on January 17, 1952 (Appendix 18).

Petitioner then filed a motion to vacate the order of dismissal, or, in the alternative, for leave to appeal *in forma pauperis.* While these motions were pending, and at the suggestion of the District Judge, petitioner filed, on February 27, 1952, a notice of appeal from the order dismissing the complaint. Thereafter, Judge Morris filed a memorandum, on April 22, 1952, stating his reasons for denying the alternative motion for leave to appeal in forma pauperis, and an order was entered (Appendix 22) denying that motion and the motion to vacate on April 24, 1952. The memorandum of Judge Morris is not reported.

In the meantime, this Court had handed down its decision in *Blackmar* v. *Guerre,* 342 U.S. 512, decided March 3, 1952, holding that the Civil Service Commission was not suable as a corporate entity. This holding, if no remedial action were taken, would have meant that one of the two respondents was not before the court at all. Hence, petitioner filed motions in the District Court to amend the summons, to add parties defendant, and to amend the complaint. (Appendix 23, 25, 27). The three motions were denied by Judge Bastian on May 20, 1952, on the ground that the filing of the notice of appeal on February 27 had divested the District Court of jurisdiction of the case (Appendix 28). Thereafter, on June 16, 1952, petitioner filed a second notice of appeal, not only from the order dismissing the complaint, but also from the subsequent orders denying leave to appeal *in forma pauperis* and

leave to amend the summons and complaint by adding parties defendant.

In the Court of Appeals, appellees moved to dismiss the appeal, or in the alternative to affirm the judgment of the lower court, on the ground that the Civil Service Commission was not properly before the court, in view of the ruling in *Blackmar* v. *Guerre, supra.* Oral argument of that, and several other, motions (including original motions in the Court of Appeals to amend the summons and complaint and to add parties appellee) was had before *Stephens, Chief Judge,* and *Miller,* and *Bazelon, Circuit Judges* and, on January 20, 1953, the Court of Appeals entered its order dismissing the appeal, but remanding the case to the District Court with leave to petitioner to move for an order vacating the previous judgment of dismissal and granting leave to file an amended complaint. (Appendix 14). Thereafter, petitioner moved the District Court for the relief described in the order of the Court of Appeals, and on January 5, 1954, an order was entered by Judge Morris vacating his order of January 17, 1952, and granting leave to file an amended complaint. On January 6, 1954, the amended complaint was filed.

The amendment of the complaint had nothing to do with the merits of the claims alleged therein, but was necessitated solely because of this Court's holding in the *Blackmar* case.

Upon motion of the defendants in the District Court, Judge Tamm dismissed the amended complaint on the same grounds that the original complaint had been dismissed, namely, want of jurisdiction of the subject matter and failure to state a claim.

On appeal, the Court of Appeals affirmed the judgment of the District Court, in an opinion filed July 14, 1955, following oral argument on May 13, 1955, (Appendix 1) and a petition for rehearing *en banc* was denied by *per curiam* order entered on September 1, 1955.

REASONS FOR GRANTING WRIT

1. The questions presented are of general importance; are likely to arise frequently in the future; and have not been correctly decided in the lower courts.

2. The case presents an important procedural question involving the interpretation of this Court's holding in *Adkins* v. *DuPont Co.,* 335 U.S. 331, which the Court should consider, in view of the interpretation placed on its holding by the U. S. Attorney and by the District Court (Appendix 22), in order that the scope of the *forma pauperis* privilege conferred under the provisions of 28 U.S.C. 1915 may not be unduly limited, contrary to the intent of the statute and the policy of Congress in enacting it.

3. The case presents an important procedural question arising out of this Court's holding in *Blackmar* v. *Guerre,* 342 U.S. 512, which the Court should consider, in view of the interpretation of the holding therein by the lower courts and the extreme hardship which may result in other cases, as it did in this, from the purely formal error of suing an agency of the United States under the wrong name. (See Order Denying Remedial Motions—Appendix, p. 28) Consideration of this question will give the Court an opportunity to reconsider its holding in the *Blackmar*

case and to limit or change the rule of that case, if such action appears desirable upon re-analysis of the problem presented in that and similar cases.

4. The case presents an important substantive question, involving the proper administration of Section 11 of the A.P.A., namely the propriety of administrative action; taken under a regulation which relieves federal agencies of the necessity of following established civil service procedures in filling vacancies in hearing examiner positions and authorizes the agencies to appoint as examiners the incumbents of positions reallocated as hearing examiner positions on the basis of legislation, court decision, or executive order, instead of requiring that vacancies arising from reallocation on such a basis be filled through selection from certificates of eligibles from the official registers of the Civil Service Commission; where it appears that the authority granted under the regulation has been abused by an agency (a) in designating as examiners persons who were *not* "incumbents" of positions *properly* reallocable as hearing examiner positions "on the basis of" this Court's decision in *Riss & Co., Inc.*, v. *U. S., et al.*, 341 U.S. 907, since they had never performed hearing examiner duties; and (b) in designating as examiners persons whose principal duty, before and after designation, requires them to participate actively in the formulation of the appointing agency's policies, which is a duty that is "inconsistent with their duties and responsibilities as examiners", and, consequently, the designation of such persons, under the circumstances, was in violation of an express provision of Section 11.

5. The case presents important substantive questions arising from petitioner's claim that he and persons in similar situations had a legal *right* (a) to require the Interstate Commerce Commission *to reallocate* his position as a hearing examiner position on the basis of the *Riss* decision, (since he had been performing the duties of a hearing examiner prior to the decision) and (b) to designate him as a hearing examiner under the authority of the regulation authorizing the appointment of incumbents, where the record established (1) that his performance of the *actual duties* of the positions, during a probationary period, had been formally determined by the Interstate Commerce Commission to be fully satisfactory; (2) that the duties of the position were the same, before and after the *Riss* decision; (3) that he satisfied all the requirements for appointment to hearing examiner positions set forth in Section 11 and the regulations of the Civil Service Commission thereunder; (4) that he possessed all the qualifications deemed necessary or desirable by the Interstate Commerce Commission; (5) that under the provisions of Section 14 of the Veterans Preference Act, petitioner could not have been removed from his position, if the *Riss* case had not been decided, except on notice, for cause, and after hearing; (6) that he had been formally determined to be qualified for appointment to hearing examiner positions in the open competitive examination of the Civil Service Commission; (7) that the agency required the services of the petitioner as a hearing examiner *after* the *Riss* decision to the same, or greater, extent than the same services were required and furnished by the petitioner prior to the decision as employees in a position *nominally* different from a

hearing examiner position, but *actually* identical with such a position; and (8) that the Interstate Commerce Commission, after the *Riss* decision, *formally approved* petitioner's appointment as a hearing examiner, provided that appointment could be made from the registers, asserting (as the reason for not appointing him under the regulation authorizing the appointment of incumbents) that his appointment was not authorized under that regulation because he occupied a position allocated prior to the *Riss* decision, in grade GS-9, that reallocation as a hearing examiner position on the basis of the *Riss* decision would have to be made in a grade no lower than GS-11; and that the Interstate Commerce Commission *had no power* to appoint any incumbent if the appointment would also entail incidental increases in rank and pay.

6. The judgment of the Court of Appeals constitutes such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The petitioner's complaint is not that the Court of Appeals decided his case incorrectly, but that it did not decide it at all. The grounds for review of the decision on the substantive questions relative to the appointment of incumbents on the basis of the *Riss* decision are the same as those which were argued by petitioner in his petition for rehearing in the Court of Appeals (R. 58-71), copies of which are being filed with this petition for the convenience of the Court.

CONCLUSION

The Court should grant the writ to review the questions as stated in the foregoing petition.

Respectfully submitted,

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Petitioner, pro se.

SUPPLEMENT

STATUTES AND REGULATIONS INVOLVED

Administrative Procedure Act

(Act of June 11, 1946, 60 Stat. 237, 5 USCA 1001 *et seq.*)

SECTION 11. *Appointment of examiners; assignment, removal, and compensation; jurisdiction of Civil Service Commission.*

Subject to the civil-service and other laws to the extent not inconsistent with this chapter, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8 of this chapter, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and on the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendation or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended, and the provisions of section 9 of said Act, as amended, shall not be applicable. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected by the Commission from and with the consent of other agencies. For the purposes of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, appoint such advisory committees as may be deemed necessary, recommend legislation, subpoena witnesses or records, and pay witness fees as established for the United States courts.

CODE OF FEDERAL REGULATIONS—TITLE 5—ADMINISTRATIVE PERSONNEL

Chapter I—Civil Service Commission

Part 34. Appointment, Compensation, and Removal of Hearing Examiners, Promotion, Reassignment, and Transfer.

Effective upon publication in the Federal Register, subparagraph 3 of #34.5 (b) is amended to read as follows:

34.5 Promotion, Reassignment, and Transfer.

• • • • • • • • • • •

(b) From a position other than a hearing examiner position.

(3) An employee who is serving in a position which is allocated as a hearing examiner position on the basis of legislation, Executive Order, or decision of a court, after June 11, 1947, may be appointed as a hearing examiner if the following conditions are met:

(i) He must have competitive status, or be serving in a permanent position under an excepted appointment.

(ii) He must have been serving in the position on the date of the legislation, Executive Order, or decision of the court on which the allocation of the position is based.

(iii) A recommendation for his appointment must be received by the Civil Service Commission from the agency concerned not later than six months after the date of the legislation, Executive Order, or decision of the court.

(iv) His qualifications for the position must be approved by the Commission.

In emergency situations, when the needs of the service require it, the Commission will authorize conditional

appointments of employees pending final decision on their eligibility for absolute appointment under this paragraph.

(Sec. 11, 60 Stat. 244; 5 USC 1010)

16 Federal Register 3527
April 25, 1951.

(NOTE: This regulation has been re-numbered as #34.3 (c) of the current regulations, published September 21, 1951, in 16 Federal Register, at page 9625).

Veterans Preference Act of 1944

58 Stat. 387 — 5 U.S.C. 851.

SECTION 2. *Persons entitled to federal employment preference.* In certification for appointment, in appointment, in reinstatement, in reemployment, and in retention in civilian positions in all establishments, bureaus, administrations, projects, and departments of the Government, permanent or temporary, and in either (a) the classified civil service; (b) the unclassified civil service; (c) any temporary or emergency establishment, agency, bureau, administration, project, and department created by Acts of Congress or Presidential Executive order; and (d) the civil service of the District of Columbia, preference shall be given to . . . and (4) those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and have been separated therefrom under honorable conditions. . . . (5 USCA 851)

SECTION 11. *Rules and regulations by Civil Service Commission.* The Civil Service Commission is hereby authorized to promulgate appropriate rules and regulations for the administration and enforcement of the provisions of this chapter. (5 USCA 860).

SECTION 14. *Discharge, suspension, etc., only for cause; reason in writing; advance notice; personal appearance; finding and recommendations.* No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, . . . shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension . . . furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice . . . stating any and all reasons specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission fron an adverse decision of the administrative officer so acting . . . *Provided,* That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends . . . (5 USCA 863).

SECTION 19. *Enforcement of rules and regulations by Commission.* It shall be the authority and duty of the Civil Service Commission in all cases under the classified civil service to make and enforce appropriate rules and regulations to carry into full effect the provisions, intent, and

purpose of this chapter and such Executive orders as may be issued pursuant thereto and in furtherance thereof: *Provided,* That any recommendation by the Civil Service Commission, submitted to any Federal agency, on the basis of the appeal of any preference eligible, employee or former employee, shall be complied with by such agency. (5 USCA 868).

Classification Act of 1949

(Oct. 28, 1949; 782, Title I, # 101 etc.,)

(Section references are to Title 5, United States Code.)

SECTION 1071. *Congressional declaration of policy.*

It is the purpose of this chapter to provide a plan for classification of positions and for rates of basic compensation whereby—

(1) In determining the rate of basic compensation which an officer or employee shall receive, (A) the principle of equal pay for substantially equal work shall be followed, and (B) variations in rates of basic compensation paid to different officers and employees shall be in proportion to substantial differences in the difficulty, responsibility, and qualification requirements of the work performed and to the contributions of officers and employees to efficiency and economy in the service; and

(2) individual positions shall, in accordance with their duties, responsibilities, and qualification requirements, be so grouped and identified by classes and grades, as defined in section 1091 of this title, and the various classes shall be so described in published standards, as provided for in section 1094 of this title, that the resulting position-classification system can be used in all phases of personnel administration.

SECTION 1072. *Regulations.*

The Commission is authorized to issue such regulations as may be necessary for the administration of this chapter.

SECTION 1075. *Veterans' preference applicable to chapter.*

Nothing in this chapter shall be construed to affect the application to officers and employees to whom this chapter applies of the veteran-preference provisions in the Civil Service Act, as amended, and the Veterans' Preference Act of 1944, as amended.

SECTION 1091. *Definitions.* For the purposes of this chapter, the term—

(1) "position" means the work, consisting of the duties and responsibilities, assignable to an officer or employee;

(2) "class" or "class of positions" includes all positions which are sufficiently similar, as to (A) kind or subject-matter of work, (B) level of difficulty and responsibility, and (C) the qualification requirements of the work, to warrant similar treatment in personnel and pay administration; and

(3) "grade" includes all classes of positions (although different with respect to kind or subject-matter of the work) which are sufficiently equivalent as to (A) level of difficulty and responsibility, and (B) level of qualification requirements of the work, to warrant the inclusion of such classes of positions within one range of rates of basic compensation, as specified in subchapter V of this chapter.

SECTION 1092. *Basis for determination of position in class.*

(a) Each position shall be placed in its appropriate class. The basis for determining the class in which each position shall be placed shall be the duties and responsibilities of such position and the qualifications required by such duties and responsibilities.

(b) Each class shall be placed in its appropriate grade. The basis for determining the grade in which each class

shall be placed shall be the level of difficulty, responsibility, and qualification requirements of the work of each class.

SECTION 1094. *Preparation and publication of standards for classification of positions.*

(a) The Commission, after consultation with the departments, shall prepare standards for placing positions in their proper classes and grades * * *

(b) The Commission shall keep such standards up to date. * * *

SECTION 1101. *General authority of Commission.*

(a) Notwithstanding section 1102 of this title, the Commission shall have authority, which may be exercised at any time in its discretion, to:—

(1) ascertain currently the facts as to the duties, responsibilities, and qualification requirements of any position;

(2) place in an appropriate class and grade any newly created position or any position coming initially under this chapter;

(3) decide whether any position is in its appropriate class and grade; and

(4) change any position from one class or grade to another class or grade whenever the facts warrant.

The Commission shall certify to the department concerned action taken by the Commission under paragraph (2) or (4) of this subsection. The department shall take action in accordance with such certificate, and such certificate shall be binding on all administrative, certifying, pay roll, disbursing, and accounting officers of the Government.

(b) Any employee or employees (including any officer or officers) affected or any department may request at any time that the Commission exercise the authority granted to

it under subsection (a) of this section and the Commission shall act on such request.

SECTION 1102. *Allocation of positions in appropriate grade by departments; review by Commission.*

(a) Except as otherwise provided in this subchapter, each department shall place each position under its jurisdiction and to which this chapter applies in its appropriate class and grade in conformance with standards published by the Commission, or, if no published standards directly apply, consistently with published standards. A department may, whenever the facts warrant, change any position which it has placed in a class or grade under this subsection from such class or grade to another class or grade. Such actions of the departments shall be the basis for the payment of compensation and for personnel transactions until changed by certificate of the Commission.

(b) The Commission shall, from time to time, review such number of positions in each department as will enable the Commission to determine whether such department is placing positions in classes and grades in conformance with or consistently with published standards.

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APPENDIX

Opinion of Court of Appeals

(R-54-56)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12370

SIMON J. NASH, individually and on behalf of all eligibles and preference eligibles awaiting appointment to Hearing Examiner positions by certification from official registers established by the Civil Service Commission on the basis of its open competitive examination, conducted under Section 11 of the Administrative Procedure Act, *Appellant*,

v.

INTERSTATE COMMERCE COMMISSION, AND PHILIP YOUNG, GEORGE M. MOORE, AND FREDERICK J. LAWTON, as Members of the United States Civil Service Commission, *Appellees*.

Appeal from the United States District Court
for the District of Columbia

Decided July 14, 1955

Mr. Simon J. Nash, appellant *pro se*.

Mr. Lewis Carroll, Assistant United States Attorney, with whom *Mr. Leo A. Rover*, United States Attorney, and *Miss Catherine B. Kelly*, Assistant United States Attorney, were on the brief, for appellees.

Before PRETTYMAN, BAZELON and WASHINGTON, Circuit Judges.

WASHINGTON, *Circuit Judge:* Prior to the decision of the Supreme Court in *Riss & Co., Inc.* v. *United States,* 341 U.S. 907 (April 16, 1951), plaintiff-appellant Nash was employed by the Interstate Commerce Commission as an "Examiner" in Grade GS-9. He held hearings in cases similar to *Riss.* He was not an examiner appointed pursuant to Section 11 of the Administrative Procedure Act, although he had, while in his Interstate Commerce Commission position, taken and passed an examination to that end and was listed on a register of eligibles for such appointment in Grades GS-11, GS-12 or GS-13. Under a rule previously established by the Civil Service Commission the minimum grade of a Section 11 hearing examiner was GS-11, a higher-salaried grade than that occupied by Nash.

After the decision in *Riss,* the Interstate Commerce Commission could no longer utilize—for proceedings of the type there involved—examiners not appointed under Section 11. A regulation of the Civil Service Commission authorized the appointment of incumbent examiners, if they could meet certain required conditions, as Section 11 hearing examiners.[1] Subject to the approval of the Civil Service Commission, the Interstate Commerce Commission proceeded to appoint under Section 11, and the regulation just mentioned, a number of hearing examiners. It limited its appointments, however, to incumbents already in Grades GS-11 or higher. Plaintiff-appellant asked the Interstate Commerce Commission for an appointment under Section 11 at Grade GS-13, claiming that he met the requirements of the regulations because he had been placed on a hearing examiner register as eligible for appoint-

[1] The regulation authorized the agencies to give non-competitive appointments to positions which were re-allocated as hearing examiner positions on the basis of legislation, executive order or court decision subsequent to June 11, 1947. 16 FED. REG. 3527, 5 C.F.R. § 34.5(b)(3); now 16 FED. REG. 9626, 5 C.F.R. § 34.5(b). See also 16 FED. REG. 9623, 5 C.F.R. § 34.3(c).

ment in Grades GS-11, GS-12, or GS-13. His request was refused.[2] He appealed to the Civil Service Commission without success. He then brought suit in the District Court on several alternate grounds, seeking as ultimate relief a declaratory judgment which would lead to his appointment as a hearing examiner under Section 11 at Grade GS-13 or GS-15. His suit was dismissed, and he appealed.

In our view, plaintiff-appellant's demand is in essence this: that he be selected for a higher rated post and paid a higher salary. Such a demand is primarily one for consideration and decision by the agencies involved, and not by the courts. *Powell* v. *Brannan*, 91 U.S. App. D.C. 16, 196 F. 2d 871 (1952); *cf. Ramspeck* v. *Trial Examiners Conference*, 345 U.S. 128 at 138 (1953). Nothing in the governing statutes and regulations gave plaintiff a vested right to the appointment he seeks. No procedural error was committed. There was no misconstruction of governing law, and no arbitrary or caprious action.

The judgment of the District Court, dismissing the complaint, must be

Affirmed.

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[2] He was advised that he would be appointed to a hearing examiner position when he was reached on the register. In the meantime, he was assigned by the Commission to work not involving the hearing of cases.

Announcement of Designation of Incumbents of Positions Reallocated as Hearing Examiner Positions on the Basis of the Riss Decision

(R-25, 26)

INTERSTATE COMMERCE COMMISSION

WASHINGTON, D. C.

April 30, 1951.

Notice To The Public:

Effective April 29, 1951, in compliance with Section 11 of the Administrative Procedure Act, Public Law 404—79th Congress, Chapter 324, Second Session, the Interstate Commerce Commission has designated the following examiners as hearing examiners:

BUREAU OF MOTOR CARRIERS

Harold W. Angle
Allan F. Borroughs
Harold P. Boss
C. Evans Brooks
Bruce W. Card
James I. Carr
James Cheseldine
Francis A. Clifford
Hobart C. Clough
Gerald F. Colfer
Fabian W. Cox
Philip N. Crowley
Leo W. Cunningham
George A. Dahan
Michael B. Driscoll
Curtis R. Englehart
Reece Harrison
Alfred B. Hurley
Lucian A. Jackson
Edward E. Kobernusz
Walter R. Lee
F. Roy Linn
John McCarthy
William J. Messer
Eldon J. Miller
Robert H. Murphy
Mack Myers
Thomas J. Patrick
Levi M. Pettis
George E. Proudley
Charles H. Riegner
Richard H. Roberts
Frank R. Saltzman
Harold L. B. Seaman
Clarence L. Simmons
Alton R. Smith
James L. Smith
Donald R. Sutherland
Melvin L. Winson
Richard Yardley
Joseph M. Zurlo

BUREAU OF FINANCE

Timothy M. Cremins
Lucian Jordon
Alva G. Nye
Robert Romero

W. P. BARTEL,
Secretary.

(R-27)

INTERSTATE COMMERCE COMMISSION
WASHINGTON, D. C.

May 4, 1951.

Notice To The Public:

Effective today, in compliance with Section 11 of the Administrative Procedure Act, Public Law 404 — 79th Congress, Chapter 324, Second Session, the Interstate Commerce Commission has designated the following examiners as hearing examiners:

BUREAU OF MOTOR CARRIERS

William J. Cave
Lawrence B. Dunn
James H. Gaffney
Herbert L. Hanback
Thomas F. Kilroy
Warder Rannells
Beverly S. Simms

W. P. BARTEL,
Secretary.

(R-27, 28)

INTERSTATE COMMERCE COMMISSION
WASHINGTON, D. C.

May 7, 1951.

Notice To The Public:

Effective today, in compliance with Section 11 of the Administrative Procedure Act, Public Law 404 — 79th

Congress, Chapter 324, Second Session, the Interstate Commerce Commission has designated the following examiners as hearing examiners:

BUREAU OF FORMAL CASES

Walter T. Cantrell
Alvin L. Corbin
Charles E. Morgan
Aubrey T. Palmer
Thomas E. Pyne
Arnold J. Roth
William J. Sweeney, Jr.

BUREAU OF MOTOR CARRIERS

Stephen A. Aplin
Vernon V. Baker
R. Edwin Brady
T. Kinsey Carpenter
Michael T. Corcoran
Paul Coyle
William T. Croft
Isadore Friedson
Allen W. Haggerty
Robert A. Joyner
Irving J. Raley
Leo A. Riegel
Alvin W. Schutrumpf
Bertram E. Stillwell
William R. Tyers
Lawrence A. Van Dyke, Jr.
David Waters

W. P. BARTEL,
Secretary.

Summary of Petitioner's Educational and Professional Qualifications

(R-49, 50)

I. *Education:*

AB., Canisius College, Buffalo, N.Y., June 1935.
LL.B., University of Buffalo—June 1938.
LL.M., Catholic University—June 1954.
Graduate Studies at Georgetown University School of Law—Sept. 1948 to June 1950.

Graduate Studies at Catholic University, June 1950 to date.

Law-School Class Standing: No. 1 for entire three-year course. (Class of about 100)

II. *Admission to Bars*

Jurisdiction	*Date*
New York	1939
US DC WD NY	1940
Supreme Court of U.S.	1948
Dist. Ct., D. of C.	1949
Court of Appeals for the D. of C. Circuit	1949
US Court of Military Appeals	1950
Federal Communications Commission	1951
Board of Immigration Appeals	1951
Municipal Court, Washington, D. C.	1952

III. *Membership in Professional Societies*

American Bar Association (since 1948)
Admin. Law Section of A.B.A. (since 1950)
District of Columbia Bar Ass'n (since 1951)
Admin. Law Section of D.C. Bar Ass'n (since 1952)
American Society of International Law (since 1951)
Riccobono Seminar of Roman Law in America (since 1949)

IV. *Military Service*

Inducted: February 2, 1942: Private of Infantry.
Discharged: May 25, 1946: Major, Air Corps.
Army Commendaton Award for Court Martial and Legal Duties.

V. *Employment in Civil Service*

1946-1947 Dept of the Army GS-11 (15 months)
Trial Atty.

1948-1949 Dept of the Army GS-12 (14 months)
Trial Atty.

All efficiency ratings from military superiors were 'Superior' while in the service, and 'Excellent' while employed as a trial attorney, the highest ratings which might then be awarded.

Memorandum No. 1592*

(From Personnel Officer to Chairman of Division 1, I.C.C.)

(R-46, 47)

Memorandum to Commissioner Mahaffie
Chairman Division One

The Bureau of Motor Carriers has requested the appointment of Mr. Simon J. Nash as Hearing Examiner, GS-11, $5400, to replace Wm. E. Messer, who has resigned to accept a position with the Office of Price Stabilization (E.S.A.) and who has reemployment rights.

Mr. Nash, 36, is presently an Examiner, GS-9, $4600, in the Section of Complaints, and prior to the decision in the Riss Case was regularly assigned in the hearing of certificate cases. He entered the competitive examination for Hearing Examiner in 1948 and is on the Civil Service Register of eligibles for GS-11, 12, and 13. His position was one of those that is considered as having become a Hearing Examiner position by virtue of the Riss decision, but since his appointment would have involved a promotion, the Civil Service officials declined to approve his conditional appointment under the recent emergency action involving a number of other examiners whose change in status involved no change in grade.

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* Undated. On or about May 25, 1951. See Memorandum denying petitioner's request for appointment, p. 13, *infra*.

I recommend that Mr. Nash be appointed Hearing Examiner, GS-11, provided his name is within reach on the register. Commissioner Rogers and the Secretary approve.

WM. L. COVINGTON
Wm. L. Covington
Personnel Officer

Petitioner's Request for Appointment

(R-33, 34)

June 29, 1951.

Interstate Commerce Commission
Washington 25, D. C.

Subject: Request for appointment as Hearing Examiner.
Attention: Wm. L. Covington, Personnel Officer.

Gentlemen:

In my letter of April 24, 1951, I stated my reasons for thinking that I was entitled to a promotion to a hearing examiner position and requested an appointment, effective April 16, 1951, the date of the Supreme Court's decision in the Riss case.

I received no reply to my letter. Since then, however, the Commission has taken official action with a view to converting the status of 65 other employees, who held examiner positions similar to mine, from that of examiner to that of hearing examiner, on the basis of their incumbency of hearing examiner positions on the date of the Riss decision.

I have been told by Mr. Covington that the Commission has approved my promotion to a hearing examiner position at such time as my name will be among the first three on the Civil Service Commission's register of eligibles. I have been told by Mrs. Gray, Mr. Covington's classification

analyst, that I am not now an incumbent of a hearing examiner position since I have not been assigned to conduct any hearings since the Riss decision was handed down, and that the only way the Commission could promote me to such a position is to wait until my name is reached on the list.

In order to avoid any misunderstanding, I now make the following claims:

1. On April 16, 1951, I was an incumbent of an examiner position which became a hearing examiner position by court order.

2. On April 16, 1951, I was on the Civil Service Commission's register of eligibles for appointment to hearing examiner positions in grades GS-11, GS-12, and GS-13.

3. On April 16, 1951, my duties were those which are now those of a hearing examiner, GS-13.

4. On April 16, 1951, I was entitled, under the civil service laws and regulations, to an appointment as a hearing examiner, GS-13.

5. Since April 16, 1951, the Interstate Commerce Commission has taken official action looking toward the appointment of other persons now classified as examiners to hearing examiner positions in grade GS-13, on the basis of their incumbency of hearing examiner positions on the date of the *Riss* decision. On that date I was performing the same duties as those examiners and I am as well qualified for a GS-13 position as any of them. I am also a preference eligible, under the statute granting preference to veterans and, if any of those examiners who have been designated temporarily as hearing examiners as a result of the *Riss* decision are not preference eligibles, my right to appointment is superior to theirs, unless cause is shown for contrary action.

I now renew my request for appointment as hearing examiner. I see no valid reason for appointment in a grade lower than that appropriate to the work I was doing on April 16 and therefore I request appointment in grade GS-13, effective April 16, 1951.

* * *

Very truly yours,

(signed) SIMON J. NASH
Simon J. Nash
Examiner.

Memorandum No. 1599

(From Personnel Officer to Chairman of Division 1, I.C.C.)

(R-47-49)

July 3, 1951

Memorandum to Commissioner Mahaffie,
Chairman, Division One:

The attached letter addressed to the Interstate Commerce Commission by Examiner Simon J. Nash under date of June 29, 1951, was received by me on the afternoon of July 2, 1951.

Mr. Nash is asserting certain alleged rights as an occupant of a position which became a hearing examiner position under the decision in the *Riss* case, April 16, 1951. This situation was fully discussed with the Chairman of the Civil Service Commission by members of the Interstate Commerce Commission, and an agreement was reached whereby a number of examiners were given conditional appointments as Hearing Examiners. At the request of the Civil Service Chairman, however, it is my understanding that it was agreed that no such appointments should involve the promotion of any individual examiner. As a result of this agreement a number of examiners in GS-9, including Mr. Nash, who had been

hearing cases for the Section of Complaints, were omitted from the list of those recommended for appointment. The lowest grade for Hearing Examiner is GS-11, and the appointment of any GS-9 examiner to the position of Hearing Examiner would have required his promotion to GS-11.

This was explained to Mr. Nash and the others in like situations but he attempts to distinguish his case from the rest on the grounds of his eligibility for appointment on the competitive register. His appointment by certification from this register, as recommended in my Memorandum No. 1592, was approved by the Chairman of Division One on May 25, 1951.

Since that date close contact has been maintained with Civil Service officials to determine informally when Mr. Nash would be reached for certification. His position on the register was improved by his successful appeal for higher ratings, but to this date his name has not been advanced to a sufficiently high position to place him among the top three on the GS-11 register.

Mr. Nash's assumption that he is entitled to priority in promotion because he is a preference eligible, is erroneous. Veterans' Preference is not a factor in promotion. His request is for appointment as Hearing Examiner and promotion to GS-13. This is contrary to the agreement with Chairman Ramspeck, and I recommend that it be denied.

WM. L. COVINGTON
Personnel Officer.

Memorandum

(From Personnel Officer to Petitioner)

(R-35)

July 5, 1951.

Memorandum to Examiner Simon J. Nash:

Your letter of June 29, 1951, addressed to the Interstate Commerce Commission, was referred to the Chairman of Division One, to whom authority in such matters as presented therein has been delegated by the Commission, and his decision, denying your request is stated in Memorandum No. 1599, copy of which is attached hereto.

(signed) WM. L. COVINGTON
Wm. L. Covington
Personnel Officer

Memorandum No. 1599, Denying Request for Appointment

(From Chairman, Division 1, I.C.C., to Personnel Officer)

(R-36)

July 5, 1951.

Memorandum to Mr. Covington:

On consideration of Examiner Nash's letter of June 29, 1951, wherein he requests appointment as a hearing examiner, submitted with your memorandum of July 3, 1951, the request of Examiner Nash is denied for the reason that this Commission does not have the power at this time to name additional hearing examiners if grade promotions are involved. Mr. Nash's appointment as a hearing examiner, GS-11, was authorized May 25, 1951, provided he could be reached on the hearing examiner register. That could not be done up to the present time.

A copy of this memorandum should be given to Mr. Nash when you advise him that his request is denied.

MAHAFFIE

Order of Court of Appeals—Dismissing First Appeal and Remanding to District Court

(R-51, 52)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

January Term, 1953

No. 11,494

SIMON J. NASH, *Appellant,*

v.

INTERSTATE COMMERCE COMMISSION, and UNITED STATES CIVIL SERVICE COMMISSION, *Appellees.*

Before: Stephens, Chief Judge, Miller and Bazelon, Circuit Judges, in Chambers.

ORDER

This case came on for consideration on appellees' motion to dismiss, on appellees' motion for an extension of time to file their brief, and on appellant's motion to postpone argument on the motion to dismiss.

Upon consideration whereof it is Ordered by the Court that the motion to postpone argument on the appellees' motion to dismiss be, and it is hereby, denied.

It Is Further Ordered by the Court that the motion to dismiss be granted and that this case be, and it is hereby, remanded to the United States District Court with leave to appellant to move to vacate the judgment heretofore entered and to move for leave to file an amended complaint.

Per Curiam.

Dated: Feb. 20, 1953
United States Court of Appeals
For The
District of Columbia Circuit
Filed: Feb. 20, 1953
JOSEPH W. STEWART,
Clerk

Order Granting Leave to File Amended Complaint

(R-2, 3)

Filed Jan. 5, 1954

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

January Term, 1954.

Civil No. 4247-51

SIMON J. NASH, etc., *Plaintiff*,

v.

INTERSTATE COMMERCE COMMISSION and
U.S. CIVIL SERVICE COMMISSION, *Defendants*.

ORDER

This cause having come on to be heard upon plaintiff's motion, filed November 30, 1953,

(1) to vacate the order, entered herein on January 17, 1952, dismissing the complaint;

(2) for leave to file an amended complaint naming the individual members of the United States Civil Service Commission as defendants herein, in lieu of the U.S. Civil Service Commission;

(3) for leave to amend the summons herein by adding thereto the following: "Philip Young, George M. Moore, and Frederick J. Lawton, as members of the United States Civil Service Commission, defendants." and by deleting therefrom the following: "U.S. Civil Service Commission, defendants."; and

(4) for an order directing the service of copies of the amended summons and complaint upon the defendants named therein;

And it appearing that on March 10, 1953, a mandate of the United States Court of Appeals for the District of Columbia Circuit was filed herein, remanding this case to this Court and granting leave to plaintiff to move to vacate the order dismissing the complaint and to move for leave to file an amended complaint.

And it further appearing that good cause has been shown for granting the relief sought by plaintiff in his motion filed November 30, 1953, it is by the Court, this 5th day of January, 1954,

ORDERED, that the order entered herein on January 17, 1952, dismissing the complaint, be, and the same is hereby, vacated, and it is

FURTHER ORDERED, that plaintiff be, and he is hereby, granted leave to file the amended complaint, verified November 25, 1953, a copy of which was attached to the motion; and to amend the summons by adding thereto the following defendants: Philip Young, George M. Moore, and Frederick J. Lawton, as members of the United States Civil Service Commission; and it is

FURTHER ORDERED, that the Clerk receive and file the amended complaint and issue an amended summons as authorized above, and that copies of the amended summons and complaint be delivered to the Marshal for service on the defendants named therein and on such other persons as were served with copies of the original complaint herein in the manner required by law.

(Signed) JAS. W. MORRIS

Jas. W. Morris, *District Judge*

(REC-24)

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4247-51

SIMON J. NASH, et al., *Plaintiffs*,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES CIVIL SERVICE COMMISSION, *Defendants*.

Motion to Dismiss

Come now the defendants and by their attorney, the United States Attorney, move this Court to dismiss the complaint in the above entitled case for the reason that the Court is without jurisdiction of the subject matter and for the further reason that the complaint fails to state a claim upon which relief may be granted.

/s/ CHARLES M. IRELAN
Charles M. Irelan
United States Attorney

/s/ ROSS O'DONOGHUE
Ross O'Donoghue
Assistant United States Attorney

Filed: December 10, 1951.

(REC-25)

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4247-51

SIMON J. NASH, etc., *Plaintiff*,

v.

INTERSTATE COMMERCE COMMISSION and
U.S. CIVIL SERVICE COMMISSION, *Defendants*.

ORDER

This cause having come on to be heard upon defendants' motion to dismiss and it appearing to the Court that it is without jurisdiction of the subject matter and it further appearing to the Court that the complaint fails to state a claim upon which relief may be granted, it is by the Court this 17th day of January, 1952,

ORDERED, that the complaint be and the same is hereby dismissed.

(signed) JAS. W. MORRIS,
Judge

Filed: January 17, 1952.

(REC-26)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 4247-51

SIMON J. NASH, etc., *Plaintiff*,

v.

THE INTERSTATE COMMERCE COMMISSION and
THE U.S. CIVIL SERVICE COMMISSION, *Defendants*.

Motion to Vacate Order Dismissing Complaint
and
Motion, in the Alternative, for Leave to Appeal in Forma Pauperis

Comes now Simon J. Nash, the plaintiff in this action, and respectfully moves the Court:

1. To vacate its order, filed January 17, 1952, dismissing the complaint, or, in the alternative,
2. To authorize the plaintiff to prosecute his appeal from the said order *in forma pauperis*.

The motion to vacate the order of dismissal is authorized under Rule 59 (a) (2) of the Federal Rules of Civil Procedure. In support of this motion, plaintiff respectfully asserts that the dismissal of the complaint was erroneous for the reasons set forth more fully in plaintiff's memorandum of points and authorities attached hereto and marked Appendix A.

The alternative motion for leave to appeal *in forma pauperis* is authorized under Section 1915, Title 28, United States Code. In support of the alternative motion, plaintiff has made the required affidavit of poverty, which is attached hereto and marked Appendix B.

SIMON J. NASH
Plaintiff
812 Dupont Circle Building
Washington 6, D. C.

January 28, 1952.

Affidavit of Poverty

(REC-27)

DISTRICT OF COLUMBIA
CITY OF WASHINGTON ss.

Simon J. Nash, being duly sworn, deposes and says:

1. That he is the plaintiff in this action.

2. That on January 17, 1952, an order was filed herein, dismissing his complaint on the ground that the Court lacked jurisdiction of the subject matter and on the further ground that the said complaint failed to state a claim upon which relief could be granted by the Court.

* * * * *

8. That plaintiff believes he is entitled to the relief he asks in his complaint and that he is making this affidavit to support his motion for leave to appeal from the order dismissing his complaint, in the event the Court denies his motion to set aside the order dismissing the complaint, without prepayment of costs or fees and without giving security therefor, as authorized under Section 1915 (a), Title 28, United States Code.

9. That deponent is a citizen of the United States.

10. That his only source of income is his salary from his position as examiner in the Bureau of Motor Carriers of the Interstate Commerce Commission; that his salary amounts to about $5,200 per annum; that he owns no real or personal property except personal effects of a total value of less than $50; and that his personal debts are in excess of $1,500.

11. That because of his poverty, deponent is unable to pay any part of the fees and costs incident to his appeal from the order dismissing his complaint or to give security therefor.

(signed) SIMON J. NASH

(JURAT)

(REC-28)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 4247-51

SIMON J. NASH, etc., *Plaintiff*,

v.

INTERSTATE COMMERCE COMMISSION, et al., *Defendants*.

First Notice of Appeal, February 27, 1952

Notice is hereby given this 27th day of February, 1952, that plaintiff hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 17th day of January, 1952, in favor of defendants against said plaintiff.

SIMON J. NASH
Plaintiff, pro se.

Memorandum of Judge Morris, Denying Motion for Leave to Appeal in Forma Pauperis

(REC-29)

MORRIS, *J.*, Subsequent to the decision of this Court, granting defendants' motion to dismiss the complaint, the plaintiff filed a motion to vacate said order, or in the alternative to permit prosecution of appeal in forma pauperis. Briefs in support of plaintiff's motion, and in opposition thereto, have been fully considered. The motion to vacate the previous order of this Court is denied.

Opposition to the allowance of an appeal in forma pauperis is based upon two grounds: That no substantial question of law is involved and, therefore, the trial judge should certify that the appeal is not taken in good faith, and upon the ground that the affidavit in forma pauperis

does not show the inability of the plaintiff to prosecute the appeal because of poverty. In view of the decision of this Court, acting through Chief Judge Laws, in *Federal Trial Examiners Conference, et al.*, v. *Ramspeck, et al.*, Civil Action No. 5171-51, I cannot conclude that no substantial question of law is presented in the present case for consideration by the Court of Appeals, and, therefore, I cannot certify that an appeal is not taken in good faith. In view of the showing by the plaintiff that he is earning a salary of $5,200 per annum, and his failure to show that the payment of the costs of an appeal would prevent him from being able "to provide himself and dependents with the necessities of life," as seems to be required by the ruling in *Adkins* v. *DuPont Co.*, 335 U.S. 331, I cannot conclude that the affidavit in forma pauperis constitutes a showing sufficient to authorize such appeal without prepayment of costs. I must, therefore, deny the alternative motion on that ground.

(signed) JAS. W. MORRIS
Judge

Filed: April 22, 1952.

Order Denying Motions to Vacate or for Leave to Appeal in Forma Pauperis

(REC-31)

This cause having come on to be heard on the plaintiff's motion to reconsider or in the alternative for leave to file in forma pauperis, and it appearing that valid grounds do not exist for a reconsideration herein, it is this 24th day of April, 1952,

ADJUDGED, ORDERED, AND DECREED that the motion to reconsider be denied, and it is

FURTHER ORDERED that, it appearing that plaintiff's affidavit and his motion for leave to file in forma pauperis

is insufficient in that it fails to show that payment of the costs on appeal would prevent him from being able to supply himself and his dependents with the necessities of life, plaintiff's motion for leave to file in forma pauperis be, and the same is hereby, denied.

(signed) JAS. W. MORRIS
Judge

Filed: April 24, 1952.

Motion for Order Amending the Summons, Granting Leave to File Amended Complaint, and Providing for Service of Amended Summons and Complaint on Three Additional Defendants

(REC-32)

Comes now Simon J. Nash, the plaintiff in this action, and respectfully moves the Court for an order:

1. Amending the summons issued herein on or about October 10, 1951, by deleting therefrom the words:

   "U.S. Civil Service Commission, Defendants."

   and substituting therefor the words:

   "Robert Ramspeck, Frances Perkins, and James M. Mitchell, as members of the United States Civil Service Commission, Defendants."

2. Granting leave to plaintiff to file an amended complaint in which the allegations referring to the defendant, Civil Service Commission, will be changed to refer to the three additional defendants named above, as members of the United States Civil Service Commission.

3. Directing that copies of the amended summons and complaint be served on the three additional defendants, Robert Ramspeck, Frances Perkins, and James

M. Mitchell, as members of the United States Civil Service Commission, and directing that the said defendants be required to respond to the said amended complaint within 10 days after service thereof, or, in the alternative, directing the said defendants to file notices of appearance herein, effective December 10, 1951, the date on which the defendants named in the original complaint filed their motion to dismiss the compiaint.

4. In support of this motion plaintiff states:

(a) That two separate motions for orders,

(1) Adding as parties defendant the three individual members of the Civil Service Commission, and

(2) Amending the complaint to reflect the substitution of the three members of the Commission in place of the Commission as a corporate entity;

are being filed with this motion.

(b) The purpose of the three motions is to correct the error of attempting to maintain this action against the Civil Service Commission as a corporation, rather than against the individual Commissioners.

(c) The granting of the three motions will not affect the substantive rights of the parties.

(signed) SIMON J. NASH
Simon J. Nash
Plaintiff, pro se.

May 12, 1952.

Motion for Order Adding Parties Defendant

(REC-33)

Comes now Simon J. Nash, the plaintiff in this action, and respectfully moves the Court for an order, under Rule 21 of the Federal Rules of Civil Procedure, adding, as parties defendant herein, Robert Ramspeck, Frances Perkins, and James M. Mitchell, as members of the United States Civil Service Commission.

In support of this motion, plaintiff states:

1. That on January 17, 1952, an order dismissing the complaint was entered in this action.
2. That on January 28, 1952, plaintiff filed a motion to vacate the order dismissing the complaint, or, in the alternative, for leave to proceed on appeal *in forma pauperis.*
3. That on February 27, 1952, plaintiff filed a notice of appeal to the United States Court of Appeals for the District of Columbia Circuit from this Court's order dismissing the complaint.
4. That on April 24, 1952, an order was filed denying plaintiff's motion to vacate the order dismissing the complaint and denying the alternative motion for leave to proceed on appeal *in forma pauperis.*
5. That the U. S. Civil Service Commission is named as one of the defendants in this action, and a summons and a copy of the complaint were served on the Commission on or about October 11, 1951.
6. That the individual members of the Civil Service Commission were not named as defendants and were not served with process.
7. That on March 3, 1952, the Supreme Court of the United States held that the Civil Service Commission is not a corporate entity and that a suit involving

action of the Commission must be brought against the individual Commissioners, as members of the Civil Service Commission. *Blackmar* v. *Guerre*, 342 U.S. 512.

8. That plaintiff intends to prosecute his appeal from the order of this Court dismissing his complaint and that he believes his appeal is meritorious.

9. That the purpose of this motion is to correct the error of attempting to maintain this action against the Civil Service Commission as a corporation, without joining the individual members of the Commission as parties defendant.

10. That the granting of this motion will not affect the substantive rights of the parties.

SIMON J. NASH
Plaintiff, pro se.

May 12, 1952.

(REC-35)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 4247-51

SIMON J. NASH, etc., *Plaintiff*,

v.

INTERSTATE COMMERCE COMMISSION and
U.S. CIVIL SERVICE COMMISSION, *Defendants.*

Motion for Order Amending Complaint

Comes now Simon J. Nash, the plaintiff in this action, and respectfully moves the Court, under Rule 15 of the

Federal Rules of Civil Procedure, for an order amending the complaint, filed herein October 10, 1951, as follows:

(a) By inserting, in the title of the action, the words:

"Robert Ramspeck, Frances Perkins, and James M. Mitchell, as members of the United States Civil Service Commission"

between the words,

"Interstate Commerce Commission and"

and the word,

"Defendants."

(b) By deleting the first paragraph of the said complaint, substituting therefor the following:

"1. That plaintiff is a citizen of the United States and a member of the bar of this Court; that defendant, Interstate Commerce Commission, is an independent regulatory agency of the Federal Government; that defendants, Robert Ramspeck, Frances Perkins, and James M. Mitchell, are members of the United States Civil Service Commission; and that the said defendants are parties to this action by reason of the official positions which they hold."

(c) By deleting the words,

"defendant, Civil Service Commission,"

and substituting therefor the words,

"defendants, members of the United States Civil Service Commission,"

throughout the complaint, as indicated below:

* * * * *

SIMON J. NASH
Plaintiff, pro se.
815 Dupont Circle Building
Washington 6, D. C.

Dated: May 9, 1952.

Order Denying Motions to Amend Summons and Complaint and to Add Parties Defendant

(REC-38)

This cause having come on to be heard on plaintiff's motion for order amending summons, adding parties defendant, and for order amending the complaint, and it appearing that an appeal has been noted to the United States Court of Appeals for the District of Columbia Circuit on February 27, 1952, in this action, and that, therefore, this Court is without further jurisdiction over this cause, it is this 29th day of May, 1952,

ADJUDGED, ORDERED AND DECREED that the plaintiff's motions be, and the same hereby are, denied.

(signed) WALTER M. BASTIAN
Judge

Filed: May 29, 1952.

Second Notice of Appeal, June 16, 1952

(REC-39)

Notice is hereby given this 16th day of June, 1952, that plaintiff hereby appeals to the United States Court of Appeals for the District of Columbia Circuit (1) from the order of this Court, entered January 17, 1952, dismissing the complaint in the above-entitled action; (2) from the order of this Court, entered April 24, 1952, denying plaintiff's motion, filed under Rule 59 (a) (2) of the Federal Rules of Civil Procedure, to vacate the order of January 17, 1952, or, in the alternative, to grant leave to appeal from the said order *in forma pauperis;* and (3) from the order of this Court, entered May 29, 1952, denying plaintiff's several motions, (a) for an order amending the summons; (b) for an order adding parties defendant; and (c) for an order amending the complaint; the said orders being in favor of defendants and against said plaintiff.

SIMON J. NASH
Plaintiff, pro se.

Filed: June 16, 1952.

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In the Supreme Court of the United States

OCTOBER TERM 1955

No. 563

SIMON J. NASH, INDIVIDUALLY AND ON BEHALF OF ALL ELIGIBLES AND PREFERENCE ELIGIBLES AWAITING APPOINTMENT TO HEARING EXAMINER POSITIONS BY CERTIFICATION FROM OFFICIAL REGISTERS ESTABLISHED BY THE CIVIL SERVICE COMMISSION ON THE BASIS OF ITS OPEN COMPETITIVE EXAMINATION, CONDUCTED UNDER SECTION 11 OF THE ADMINISTRATIVE PROCEDURE ACT, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, AND PHILIP YOUNG, GEORGE M. MOORE, AND FREDERICK J. LAWTON, AS MEMBERS OF THE UNITED STATES CIVIL SERVICE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. 1–3) is

reported at 225 F. 2d 42. The order of the District Court (R. 37), which was affirmed below, is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered July 14, 1955 (Pet. App. 1). A petition for rehearing *en banc*, filed July 29, 1955, was denied by the Court of Appeals on September 1, 1955 (R. 58, 72). On November 30, 1955, by order of the Chief Justice, the time for filing petitioner's petition for a writ of certiorari was extended to and including December 10, 1955. The petition was filed on December 10, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Civil Service Commission and the Interstate Commerce Commission abused their discretion in appointing hearing examiners under the Administrative Procedure Act and applicable regulations when they decided to appoint persons whose positions were reallocated as hearing examiner positions, except for those, like petitioner, whose appointment would have required a grade promotion.

2. Whether petitioner may now complain of the denial by the District Court, at the time of his first appeal to the Court of Appeals, of leave to appeal *in forma pauperis*.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Administrative Procedure Act and the Civil Service Commission regulations are set out in the Appendix, *infra*, pp. 15–18.

STATEMENT

From January 9, 1950, to April 16, 1951, petitioner was an "examiner" in the Bureau of Motor Carriers of the Interstate Commerce Commission at grades GS–7 and GS–9 (R. 6). His duties included hearings upon applications for certificates of public convenience and necessity filed by motor carriers under the Motor Carrier Act (R. 7; Pet. App. 8). On April 16, 1951, this Court decided that proceedings on such applications were subject to the Administrative Procedure Act and administrative hearings thereon should be before a hearing examiner appointed under Section 11 of that Act. *Riss & Co., Inc.* v. *United States,* 341 U. S. 907. In this action, petitioner seeks a declaration and order that he should have been appointed such a hearing examiner. The District Court dismissed his complaint and the court below affirmed. The pertinent facts may be summarized as follows:

Under Civil Service regulations issued pursuant to the Administrative Procedure Act, hearing examiners under that Act may be appointed in grades GS–11 through GS–15 (R. 4). The regulations provide two methods for appointment of

such hearing examiners. First, qualified persons may be selected from the top three eligibles on the register established by the Civil Service Commission, after open competitive examination. 5 C. F. R. 34.4, 34.5 (b) (1), (2), *infra,* pp. 15–17.[1] Second, a non-competitive appointment may be made of an employee whose position is changed to that of a Procedure Act hearing examiner on the basis of legislation, executive order, or judicial decision, if the employee has competitive status or is in a permanent position under an excepted appointment. 5 C. F. R. 34.5 (b) (3) *infra,* pp. 17–18, as published in 16 Fed Reg. 3527, now 5 C. F. R. 34.3 (c) (1955 Supp). An agency wishing to appoint such an incumbent must recommend the action within six months of the date of the legislation, executive order, or court decision which affected the position and the person's qualifications must be approved by the Civil Service Commission. 5 C. F. R. 34.5 (b) (3).

After this Court's decision in the *Riss & Co.* case, the Interstate Commerce Commission used the second alternative and made non-competitive

[1] Following the usage of the parties in the court below and in the petition for certiorari, our references to the regulation are to those in effect at the time of the Commission action here, as found in the 1949 edition of the Code of Federal Regulations and amendments in the Federal Register. The same provisions were renumbered in 16 Fed. Reg. 9623–27 and, as renumbered, are found in the 1955 supplement to the Code of Federal Regulations, Title 5, part 34. See *infra,* pp. 15–18.

appointments of incumbents. In April and May 1951, with the approval of the Civil Service Commission, sixty-five examiners in the Bureau of Motor Carriers were appointed as Administrative Procedure Act hearing examiners; eleven appointments were made in other bureaus (Pet. App. 4–6). Since the Civil Service Commission had requested that no appointment be made which required a promotion in grade and since the lowest grade for hearing examiner is GS–11, petitioner and other examiners holding the grade of GS–9 were not appointed as such hearing examiners (Pet. App. 11–12). Asserting that because he had taken the open competitive examination and was on the register for Procedure Act hearing examiners with grades of GS–11, GS–12, and GS–13, petitioner requested appointment as a GS–13 examiner. (Pet. App. 9–11). The Commerce Commission denied this request on the ground that it "does not have the power at this time to name additional hearing examiners if grade promotions are involved." (Pet. App. 13).[2]

Petitioner, on behalf of himself and others similarly situated, then brought suit against the In-

[2] On May 25, 1951, however, the Commerce Commission authorized appointment of petitioner as hearing examiner, GS–11, if his name was one of the top three on the competitive register of eligibles (Pet. App. 8–9, 12), thus exercising its power under the first alternative method of appointing hearing examiners, *supra*, p. 4. Petitioner's name has not yet reached that stage on the register.

terstate Commerce Commission and the Civil Service Commission for declaratory and injunctive relief, seeking, *inter alia,* an order directing that he be appointed as a Procedure Act hearing examiner with grade GS–15 (R. 20–23). The complaint alleged that the regulation authorizing non-competitive appointment (5 C. F. R. 34.5 (b) (3)) was invalid and that appointments of hearing examiners must be made from the register of eligibles (R. 14–16). In addition, petitioner urged that, assuming the regulation was valid, it was an abuse of discretion to deny him a non-competitive appointment (R. 20–21). He alleged that he met the standards set by the regulation and that his existing grade was irrelevant. He further asserted that the Commerce Commission improperly appointed persons who had not previously performed hearing examiner duties or whose other duties were inconsistent with a position of hearing examiner (R. 11–12, 17–18).[3]

The District Court granted the Commissions' motion to dismiss the complaint for lack of jurisdiction and for failure to state a cause of action, and also denied petitioner's motions to vacate the judgment, to permit appeal *in forma pauperis,* and to permit amendment of the complaint and summons (Pet. App. 18, 21–23, 28). On appeal

[3] Only this second theory of the complaint, that there was abuse of discretion under the regulation, is presented by the petition for certiorari (Pet. 2–4, 20–22). Petitioner does not now contest the validity of the regulation.

in 1952, the Court of Appeals remanded the case with leave to move the District Court to vacate the judgment and permit the filing of an amended complaint (Pet. App. 14). The District Court granted such motions, by which petitioner substituted for the Civil Service Commission the individual members of the Commission as parties defendant, to avoid the effect of *Blackmar* v. *Guerre*, 342 U. S. 512 (Pet. App. 15–16). On respondents' motion, the District Court again dismissed the complaint on the grounds that it lacked jurisdiction over the subject matter and that the complaint failed to state a claim.

The court below affirmed (Pet. App. 1–3). It held that petitioner's demand was in essence for appointment to a higher post at a higher salary and this claim "is primarily one for consideration and decision by the agencies involved, and not by the courts" (Pet. App. 3). Petitioner, the court ruled, had no vested right to the appointment and there had been no procedural errors, misconstruction of law, or arbitrary action (Pet. App. 3).

ARGUMENT

1. In the first place, petitioner's complaint that the Civil Service and Interstate Commerce Commissions appointed other employees of the latter Commission to be hearing examiners, but did not appoint him, does not present any basis for judicial relief. As this Court stated in *Ramspeck*

v. *Trial Examiners Conference,* 345 U. S. 128, 133, petitioner has "no vested right" to a position as a Procedure Act hearing examiner. These positions are "creature[s] of congressional enactment," and as such, they "may be regulated completely by Congress, or Congress may delegate the exercise of its regulatory power, under proper standards, to the Civil Service Commission, which it has done. . . ." 345 U. S. at 133.

This suit is consequently blocked by the well-established principle that the courts will not interfere with the management of the executive branch and the appointment of employees. *Keim* v. *United States,* 177 U. S. 290, 295–96; *Powell* v. *Brannan,* 196 F. 2d 871 (C. A. D. C.), and cases cited. In the *Trial Examiners* case, the Court adhered to this rule and upheld Civil Service regulations governing the classification of hearing examiners by grade, their promotion, assignment of cases and reduction in force, despite the objections of numerous persons then serving as hearing examiners. 345 U. S. at 134–43. Petitioner, who objects to the method of appointing hearing examiners, has, of course, weaker ground for complaining of the governing regulations than the plaintiffs in the *Trial Examiners* case, who were then hearing examiners. See *Keim* v. *United States,* 177 U. S. at 296; *Steinberg* v. *Ramspeck,* 208 F. 2d 823 (C. A. D. C.). For that very reason the court below,

in the *Steinberg* case, held untenable an action by another person who failed to obtain an appointment as hearing examiner and who sought to attack the Civil Service Commission's management of the register of eligibles.

2. Moreover, if petitioner is in a position to challenge the Commissions' actions, we submit that those actions were a proper exercise of discretion. Section 11 of the Administrative Procedure Act, 5 U. S. C. 1010, *infra,* p. 15, provides for the appointment of hearing examiners "[s]ubject to the civil-service and other laws to the extent not inconsistent with this Act." The Civil Service Commission first made conditional appointments of persons whose positions became Procedure Act hearing examiner positions when the Act became effective, subject to approval of their qualifications. 5 C. F. R. 34.3 (a) (1949 ed.). It then conducted an open competitive examination to pass on the qualifications of incumbents and to set up a register of eligibles from which hearing examiners could be appointed. See *Ramspeck* v. *Trial Examiners Conference,* 345 U. S. at 134–35, n. 4. As pointed out in the Statement, *supra,* p. 4, the Commission also made special provision, in 5 C. F. R. 34.5 (b) (3), for persons whose positions were thereafter made subject to the Procedure Act by legislation, executive order, or court decision. Such incumbents could be appointed hearing examiners on the

recommendation of the agency involved, within 6 months of the legislation, executive order, or court decision, and upon the approval of the Civil Service Commission.

When this Court's decision in *Riss & Co.* v. *United States,* 341 U. S. 907, required allocation of a number of positions in the Interstate Commerce Commission as hearing examiners, the Commission decided to recommend the appointment of incumbents under 5 C. F. R. 34.5 (b) (3) rather than take persons from the register of eligibles. And on the request of the Civil Service Commission it was agreed that no such appointment of incumbents would be made which involved promotion to a higher grade (Pet. App. 8, 11–12).

This determination was surely within the discretion of the Civil Service Commission in deciding which appointments would be approved, and of the Commerce Commission in making recommendations. It may have been dictated by budgetary considerations or, perhaps, by the desire to avoid the additional criteria which come into play when grade increases are given.[4] In

[4] The special treatment of promotions in this area is well illustrated by other regulations governing hearing examiners. Promotion of hearing examiners, or transfers involving promotion, must be made on the basis of a promotion register, which is not involved in other transfers or reassignments. 5 C. F. R. 34.4 (a), 34.5 (a), 34.6 (a) (1955 Supp.). Previous similar provisions were at 5 C. F. R. 34.5 (a) (1949 ed.).

these circumstances, petitioner's position on the register of eligibles (on which he relies—Pet. 3–4, 21–22) was irrelevant since the appointments were made from the incumbents of allocated positions, under 34.5 (b) (3), without reference to the register.[5] And since petitioner does not now contest the validity of the general method of appointment adopted by the Commerce Commission (see Pet. 2–4, 20–22), his entire case falls with his unsuccessful attack on the reasonableness of the rule against transfers involving promotions.

Petitioner's status under the Veterans' Preference Act, 5 U. S. C. 851 *et seq.* (Pet. 3, 21), has no bearing since that Act gives no preference for promotion or transfer. In connection with the competitive examination and his rating on the register of eligibles, he has received the extra credit to which he is entitled under that Act. 5 U. S. C. 852, 856.

Nor is petitioner's case aided by his attack upon the appointment under 5 C. F. R. 34.5 (b) (3) of fellow-employees as hearing examiners, on the ground that some were not qualified (Pet. 2–3, 20). Even if petitioner's claim were true, it does not mean that petitioner would have been appointed in their stead. And, in any event, the responsibility for passing on their qualifications has been

[5] Petitioner has been assured of an appointment as a Procedure Act hearing examiner when his name is within reach on the register (Pet. App. 8–9, 13), fn. 2, *supra*, p. 5.

left by Congress to the Civil Service Commission. See *Keim* v. *United States*, 177 U. S. 290; *Steinberg* v. *Ramspeck*, 208 F. 2d 823 (C. A. D. C.).

3. At the time of his first appeal in 1952, petitioner's application for leave to appeal *in forma pauperis* was denied by the District Court (Pet. App. 21–23). Judge Morris held that petitioner had not made sufficient showing to come under *Adkins* v. *DuPont Co.*, 335 U. S. 331, in which this Court had found adequate an affidavit stating that the party could not pay costs and still provide himself and his dependents with the necessities of life (335 U. S. at 339). Here, petitioner stated only that his sole source of income was an annual salary of $5,200, that he had no property except personal effects valued at less than $50, and that his personal debts exceeded $1,500. This does not show a pressing need comparable to that in *Adkins;* without an explicit computation of the amount of potential costs (see 335 U. S. at 335, 339), it is inadequate.

Furthermore, petitioner has made no effort to keep alive his claim to proceed *in forma pauperis.* While he appealed from Judge Morris' order on his first appeal, he failed to apply to the Court of Appeals for leave to appeal *in forma pauperis,* as required by the practice of that court. *Gerringer* v. *United States,* 213 F. 2d 346, 348 (C. A. D. C.); *Waterman* v. *McMillan,* 135 F. 2d 807, 808 (C. A. D. C.). And after the Court of Ap-

peals remanded for amendment of the complaint without passing on this question (*supra*, p. 7), petitioner made no further application for such leave to the District Court or to the Court of Appeals. 28 U. S. C. 1915 (a) gives each federal court the power to authorize proceedings *in forma pauperis* before it, and generally each step in a litigation requires a separate showing in order to act *in forma pauperis*. See *Kinney* v. *Plymouth Rock Squab Co.*, 236 U. S. 43, 45–46; *Morris* v. *Igoe*, 209 F. 2d 108 (C. A. 7). Accordingly, this issue is not properly presented here.

4. Despite his protestations (Pet. 4–5, 19–20), petitioner can hardly claim that he was adversely affected by proceedings in the courts below after this Court's decision in *Blackmar* v. *Guerre*, 342 U. S. 512, that the Civil Service Commission could not be sued *eo nomine*.

On his first appeal, the Court of Appeals remanded the case with leave to move to vacate the judgment and file an amended complaint. This motion was granted and the names of the members of the Civil Service Commission were substituted as parties defendant for the Commission. *Supra*, p. 7.

On the other hand, there is a serious question whether the Interstate Commerce Commission may properly be subjected to this suit as an entity. Petitioner substituted the names of the members of the Civil Service Commission for that Commission as an entity, but has continued to

press his claim against the Commerce Commission. While Congress has authorized actions to review regulatory orders of the Commerce Commission (49 U. S. C. 17 (9), 305 (g); 28 U. S. C. 1336), and the Commission may appear in such actions (28 U. S. C. 2323), it does not follow that the Commission may be sued *eo nomine* in the entirely different case of an employee seeking judicial review of decisions to appoint, promote or remove. Cf. *Blackmar* v. *Guerre*, 342 U. S. 512, 514–15; *Isner* v. *Interstate Commerce Commission*, 90 F. Supp. 361 (E. D. Mich.). Petitioner is charging the members of the Commission with an abuse of discretion beyond their authority under statute and regulations, and such a complaint is ordinarily brought against the officials personally. *Blackmar* v. *Guerre, supra; Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDIX

1. Section 11 of the Administrative Procedure Act, 60 Stat. 244, 5 U. S. C. 1010, provides in pertinent part:

> Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. * * * For the purposes of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, * * *.

2. At the time of the appointment of hearing examiners in the Interstate Commerce Commission, in April and May 1951, the governing Civil Service Regulations provided:

> SEC. 34.4 *Appointments.* Except as otherwise provided in the regulations in this part, the regulations for appointment to the competitive system (Part 2 of this chapter) shall apply to appointments to hearing examiner positions: *Provided,* That in view of the responsibility placed upon the Commission by section 11 of the Administrative Procedure Act of passing upon the qualifications and competency of persons appointed as hearing examiners, no appointment whatsoever, except one made

by selection from a certificate of eligibles furnished by the Commission, shall be made without the prior approval of the Commission: *Provided further,* That pursuant to section 11 of the Administrative Procedure Act, which provides for the removal of hearing examiners only for good cause determined by the Commission after opportunity for a hearing and upon the basis of the record thereof, no probationary period shall be required in appointments to hearing examiner positions. [5 CFR 34.4 (1949 ed.), now 5 CFR 34.3 (a), (b) (1955 Supp.).]

SEC. 34.5 *Promotion, reassignment and transfer.* * * *

(b) *From a position other than a hearing examiner position.* (1) Except as provided in subparagraphs (3) and (4) of this paragraph, when an agency desires to fill a vacancy in a hearing examiner position by the promotion, reassignment, or transfer of an employee who has a competitive status and is serving in a position other than a hearing examiner position, it shall submit the name of the person to the Commission, together with an application form executed by him. The Commission will rate the qualifications of the applicant in accordance with the experience and training requirements of the open competitive examination (except the maximum age requirement), including an investigation of character and suitability and an oral interview. The name of the person proposed will be entered on the open competitive register in accordance with the rating received. If his name is then within reach for certification, the Commission will approve the pro-

motion, reassignment, or transfer; otherwise it will disapprove the request. [5 CFR 34.5 (b) (1) (1949 ed.) as amended 15 Fed. Reg. 2775, 6213, now 5 CFR 34.4 (b), 34.5 (b), 34.6 (b) (1955 Supp.)]

(2) An employee without competitive status, serving in a position other than a hearing examiner position, may be appointed to a hearing examiner position only after competition in the open competitive examination and upon certification by the Commission from the open competitive register. [5 CFR 34.5 (b) (2) (1949 ed.), now 5 CFR 34.3 (d) (2) (1955 Supp.).]

(3) An employee who is serving in a position which is allocated as a hearing examiner position on the basis of legislation, Executive order or decision of a court after June 11, 1947, may be appointed as a hearing examiner if the following conditions are met:

(i) He must have a competitive status, or be serving in an excepted position under a permanent appointment.

(ii) He must have been serving in the position on the date of the legislation, Executive order or decision of the court on which the allocation of the position is based.

(iii) A recommendation for his appointment must be received by the Commission from the agency concerned not later than six months after the date of the legislation, Executive order or decision of the court.

(iv) His qualifications for the position must be approved by the Commission.

In emergency situations, when the needs of the service require it, the Commission

will authorize conditional appointments of employees pending final decision on their eligibility for absolute appointment under this paragraph. [First published in 15 Fed. Reg. 2775, as amended 16 Fed. Reg. 3527, now 5 CFR 34.3 (c) (1955 Supp.).]

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